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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

against

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as vestrymen of said Church, and JAMES PERNETTE DE WOLFE as Bishop of the Diocese of Long Island,

Respondents.

BRIEF OF RESPONDENT, JAMES PERNETTE DE WOLFE, AS BISHOP OF THE DIOCESE OF LONG ISLAND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, JAMES PERNETTE DE WOLFE, AS BISHOP OF THE DIOCESE OF LONG ISLAND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the Supreme Court of New York, Special Term (R. 482 *et seq*), is reported *sub nom, Rector etc. of Holy Trinity Church* v. *Melish,* 194 Misc. 1006. The memo-

randum decision of the Appellate Division unanimously affirming the judgment below is reported in 276 App. Div. 1008. The memorandum decision of the Appellate Division denying petitioners' motion for reargument or leave to appeal to the Court of Appeals is reported in 277 App. Div. 783.

The Court of Appeals dismissed an appeal taken as of right on alleged constitutional grounds (R. 591) on October 5, 1950, in a memorandum reported in 301 N. Y. (Mem.) 679.

Questions Presented

The questions presented on this application, as distinguished from that sought to be presented in the petition, are:

1. The jurisdiction of this Court to grant certiorari,

2. The existence of any constitutional question which might have been raised in the state court.

Statement of Case

Issue.

Threatened by an attempt on the part of defendant John Howard Melish and his supporters to remove them from office as wardens and vestrymen at a special meeting of the parish, found by the trial court to have been illegally called (R. 492-494), plaintiffs brought this action.

In their complaint they sought judgment:

1. Declaring that

(a) The calling of the meeting for the purpose of removal was illegal and void,

(b) All action taken at it was null and void,

(c) The calling of a further meeting to elect successors to plaintiffs was illegal and void,

(d) Plaintiffs are duly elected and qualified members of the vestry,

(e) Defendant John Howard Melish would legally cease to be rector on April 4, 1949 and after that date will not be legally authorized to exercise the ecclesiastical and temporal rights and duties of that office.

2. Permanently enjoining defendants, other than defendant De Wolfe as Bishop, from

(a) Taking any action to declare vacant or fill by election any of the offices now occupied by plaintiffs,

(b) Interfering with plaintiffs in the proper exercise of their duties,

(c) Interfering with, delaying or preventing due execution and full compliance with the judgment of the Bishop that the pastoral relations between the rector and the church be dissolved on April 4, 1949. (R. 20-22.)

No relief was sought against defendant De Wolfe who was stated to have been joined as a proper party because of his office and because proceedings taken within his jurisdiction were involved in the action. (R. 11.)

In their answers the other defendants pleaded cross claims against defendant De Wolfe, (R. 62-69, 95-101), and sought affirmative relief against him. (R. 70, 103.)

Because of these cross claims, defendant De Wolfe served an answer in which he sought judgment against defendant John Howard Melish:

1. Declaring the pastoral relation between him and the church had ceased and determined on April 4, 1949,

2. Permanently enjoining him from exercising control of the worship and spiritual jurisdiction of the church and from the use and control of the church and parish buildings with the appurtenances and furniture thereof. (R. 114.)

No appeal having been taken from the portion of the judgment which dealt with the plaintiffs as wardens and vestrymen but only from that portion which declared the pastoral relation between John Howard Melish and the church dissolved and restrained him from acting as rector (Pet., p. 1) and no relief other than review of that portion being sought here (id., p. 2), it is apparent that petitioners are seeking to attack the jurisdiction of a court which they themselves invoked by seeking affirmative relief against defendant De Wolfe.

The basis of this attack is that since the canon under which he acted prescribes a penalty for violation *by the vestry* of the Bishop's judgment by deprivation of *lay* representation[1] of the parish in diocesan convention a civil court may not entertain an action to declare the status of defendant John Howard Melish with respect to Holy Trinity Church and protect the property of the church from his unauthorized control.

Parties.

Concededly at the commencement of the action plaintiffs were duly elected wardens and vestrymen of the church since otherwise no attempt to remove them from office would have been made.

It was never stipulated at the trial (Pet., p. 5) that a new vestry would be *validly* elected at a meeting of the parish to be held on April 18, 1949. It was stipulated, in order to avoid a continuance of the trial until the following day (R. 475), that counsel for defendants Reynolds and Mason would produce a witness on the next day, if allowed a continuance, who would testify that at a meeting held that morning of the "vestry" chosen to succeed plain-

[1] The right of John Howard Melish while he remains canonically domiciled in the diocese to a seat and vote in diocesan convention is not affected by dissolution of the pastoral relation with the church. (Constitution of the Diocese of Long Island, § 3, Plffs. Ex. 3.)

tiffs, whom the court later held to have been illegally "removed" (R. 494), a resolution had been adopted calling on the Bishop to annul his judgment. (R. 476.)

Background.

The events leading up to the present action are fully set forth and found in the decision of the trial Justice. (R. 482 *et seq.*)

Canon 27 of the Protestant Episcopal Diocese of Long Island is set forth on page 10 *et seq.* of the petition.[2]

In accordance with Sec. III of the canon the vestry gave notice in writing to the Ecclesiastical Authority, being the Bishop, dated January 21, 1949, of its desire for a separation and dissolution of the pastoral relation between the church and defendant John Howard Melish. (Printed R. 23 *et seq.*, Plffs. Ex. 1, R. 500.)

The urgent reasons for the dissolution were stated to be

1. The rector's age and physical condition,

2. Widespread dissention in the parish due to the failure of the rector to bring about the resignation or removal of the assistant minister whose outside activities had been most detrimental to the parish and had been affirmatively supported, approved and adopted by the rector. (R. 24.)

The Bishop, the matter not having been settled by his godly judgment, in pursuance of the discretion vested in him by the canon to "ask the advice and consent of the Standing Committee"[3] of the diocese referred the matter to it. (R. 26, f. 77.)

The attention of the Court is directed to the fact that reference to the Standing Committee is permissive, not

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[2] The titles in italics are not found in the canons and have been added.

[3] Consisting of four clergymen and four laymen elected by the diocesan convention.

mandatory, under the canon and that in so referring the matter the Bishop surrendered a power vested in him by the canon to proceed forthwith to judgment.

The Standing Committee then held hearings pursuant to notice (R. 502, Plffs. Ex. 6) lasting two days, at which all parties were present and represented by counsel and at which 223 pages of testimony were taken and many exhibits received. (R. 487, Defts. Ex. H and H1.)

The Standing Committee made its report to the Bishop, dated February 24, 1949. (Printed R. 26 *et seq.*, Plffs. Ex. 7, R. 503.)

In it the Standing Committee found the rector to be seventy four years old and that no evidence had been produced of impairment of health and on the contrary a letter from his physician stating he was in normal health had been submitted. (R. 29.)

It then found that Communism is incompatible with the Christian faith (R. 30-31) and, after reviewing the acts of the assistant minister (R. 34-36), which the rector had stated he approved (R. 36) and which were undenied by either the assistant or the rector either before the Standing Committee or at the trial, it was stated (R. 36):

> "Association so general with agencies standing for principles incompatible with the Christian faith calls for explanation on the part of a priest. Neither the Rector nor Assistant Minister saw fit to take advantage of his opportunity to deny or explain. Their failure constitutes an admission of conduct which could not fail to disrupt a parish and adversely affect the Church.
>
> It appears from the statement of the Rector at the time of the Bishop's visitation and his failure to deny the statements of the Vestry at our hearing that he has affirmatively supported, approved and adopted the activities of the Assistant Minister who under Canon 45 of the General Canons is under his authority. In fact in his communication to the Bishop and Standing Committee, dated February 15,

> 1946, he states 'I admit that the activities of my son, in so far as known to me, have been approved and supported by me.' "

The Standing Committee then unanimously adopted a resolution recommending dissolution. (R. 42-43.)

On March 2, 1949 the Bishop rendered his judgment (Printed R. 44-45, Plffs. Ex. 9, R. 503) providing:

1. That the pastoral relation between John Howard Melish and the church should cease and determine on April 4, 1949,

2. That the vestry should execute and deliver an agreement obligating it to pay John Howard Melish annually a sum equal to the amount received by him from the Church Pension Fund.

At the same time the Bishop handed down a memorandum stating the reasons for his action. (R. 46-50.)

Thirty days having elapsed, during which the rector refused to comply with the judgment by relinquishing his titles, the Bishop, in pursuance of the canon, issued his declaration of the canonical dissolution of all connection between the church and John Howard Melish on April 4, 1949. (Plffs. Ex. 16, R. 507-508.)

Statement as to Jurisdiction

Jurisdiction is invoked under Section 1257(3) of the U. S. Code.

Such jurisdiction therefore depends upon a showing by petitioners that

> (a) the validity of a State statute has been drawn in question on the ground of its being repugnant to the Constitution of the United States or
>
> (b) a title, right, privilege or immunity has been specially set up or claimed under the Constitution of the United States.

The petition fails to satisfy either requirement.

Argument

(a)

No state statute has been drawn in question on the ground that it is repugnant to the Constitution. On the contrary petitioners rely upon the Religious Corporations Law. (Pet., pp. 14, 21.)

The alleged constitutional question is stated as follows:

> "Whether the part of the judgment sought to be reviewed, by coercing execution and compliance with the ecclesiastical judgment of the Bishop on pain of contempt of court—in the teeth of an exclusive and different ecclesiastical remedy, namely deprivation of diocesan representation until they submit thereto —constitutes unwarranted intrusion of the civil power of the state in a religious controversy in violation of the constitutional separation of church and state guaranteed by the First Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment thereof." (Pet., p. 2.)

In presenting this question petitioners concede the judgment of the Bishop is canonically valid and admit their refusal to obey it (Pet., p. 10) is wrongful. Nonetheless they assert the right to make the First Amendment a weapon with which to protect the former rector in his occupancy and control of the parish property and control of its worship contrary to the law of the Church.

In *Watson* v. *Jones,* 80 U. S. 679, this Court divides ecclesiastical bodies into two classes:

> 1. a religious congregation which by the nature of its organisation is strictly independent of other ecclesiastical associations and so far as church government is concerned owes no fealty or obligation to any higher authority;
>
> 2. a religious congregation which is a subordinate member of some general church organisation in which there are superior tribunals with a general and ultimate power of control. (p. 722.)

Of the second class, in which the Court expressly included the Protestant Episcopal Church, the Court said:

> "* * * All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." (p. 729.)

The rule in the *Watson* case was reaffirmed in *Shepard* v. *Buckley,* 247 U. S. 1, 2, affirming the decision of the Circuit Court of Appeals, 222 Fed. 669, and is the basis of the law of New York as stated in *Connitt et al.* v. *R. P. D. C. of N. Prospect,* 54 N. Y. 551, 561, and *Baxter* v. *McDonnell,* 155 N. Y. 83, 101.

The Court will mark that no question is presented of interpretation and effect of the canons, the regularity of the procedure followed by the ecclesiastical authorities, the power of the Bishop to dissolve the pastoral relation or the effect ecclesiastically under the canon law of the Bishop's judgment.

John Howard Melish ceased to be rector of Holy Trinity Church on April 4, 1949 and would not be restored as rector by a reversal of the judgment of the Supreme Court of the state.

Construing Canon 27, Sec. IV, (2), of the diocesan canons (Pet., p. 12) petitioners argue that since no ecclesiastical penalty for violation *by the priest* of the Bishop's judgment is expressly provided in the canon it cannot be made the basis of enforcement of any right in a civil court.

Parenthetically it is important to find that at the Appellate Division a different argument was based upon this alleged absence of an express ecclesiastical penalty. There it was argued that noncompliance by a priest constituted an ecclesiastical offence triable by a church court and that until defendants Melish had been presented on charges before such a court the present action was premature. (Melish Brief, App. Div., p. 9, *et seq.*; Reynolds Brief, App. Div., p. 30 *et seq.*)

Prematurity having failed them, petitioners turn to unconstitutionality, often the refuge of those who resist lawful authority.

The cases cited in the petition establish the rule that only where the *primary* statute, ordinance or common law of the civil authority *as applied in a given case* would result in deprivation of religious liberty will the courts decline to enforce it.

In *Murdock* v. *Pennsylvania,* 319 U. S., 105, a municipal ordinance as construed and applied required religious corporations to pay a license tax as a condition to the pursuit of what was found on the facts to be "an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." (p. 110.)

The Court, however, was careful to say:

> 'Jehovah's Witnesses are not "above the law". But the present ordinance is not directed to the problems with which the police power of the state is free to deal.' (p. 116.)

In *Everson* v. *Board of Education*[4], 330 U. S. 1, a district board, acting under a statute authorising it to make rules and contracts for transportation of children to and from schools other than private schools, had authorised reimbursement of parents for fares paid for transportation by

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[4] Cited as *Illinois* v. *Board of Education.* (Pet., p. 20.)

a public carrier of children attending Roman Catholic schools.

Again it was the application of the statute to the particular facts which was reviewed.

In *Prince* v. *Massachusetts,* 321 U. S., 158, a statute forbade the sale or offer for sale of newspapers, magazines or other articles on public streets by minors. Its application to a twelve year old Jehovah's Witness who claimed to be a minister was upheld.

In *Cantwell* v. *Connecticut,* 310 U. S., 296, the application to an adult of a statute which forbade solicitation of money for a religious cause without a certificate from an officer, who was required to determine if the cause was religious and might withhold the certificate if he determined it was not, was held to be an unconstitutional restraint.

It was also held that playing a phonograph attacking the Roman Catholic Church in a neighborhood inhabited largely by its members was not an act tending toward a breach of the peace and that conviction of the common law offence violated the constitutional guarantee of religious freedom.

In *McCollom* v. *Board of Education*[5], 333 U. S., 203, the released school time case, the Court said:

> "The foregoing facts, without reference to others that appear in the record, show the use of tax supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education." (p. 209.)

In *Shelley* v. *Kraemer,* 334 U. S. 1, where enforcement of covenants against the sale of land to negroes was denied, the previous decisions to which the Court refers in the portion of the opinion quoted by petitioners are *American*

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[5] Cited as *Illinois* v. *Board of Education.* (Pet. Brief, p. 20.)

Fed. of Labor v. *Swing*, 312 U. S., 321, involving enforcement of a common law policy in restraint of peaceful picketing; *Cantwell* v. *Connecticut, supra; Bridges* v. *California*, 314 U. S., 252, enforcement of a common law rule relating to contempt by publication and *Chicago, Burlington &c. Rd.* v. *Chicago*, 166 U. S. 226, in which a judgment for nominal damages in condemnation was upheld where the case had been properly submitted to the jury.

The fact that the decision of the Court has differed according to the facts of the particular case makes the test clear.

The test is whether the application of a primary statute, ordinance or rule of common law of the civil authority to particular facts constitutes a violation of the limitations placed upon the state by constitutional guarantees of religious freedom.

New York has not interfered with worship in the present action as contended by petitioners.[6] (Pet., p. 21). It has not attempted "compulsion by law of acceptance of any creed or the practice of any form of religion". It has not attempted to restrict freedom of conscience or "freedom to adhere to such religious organisation or form of worship as the individual may choose".

On the contrary it has safeguarded the "free exercise of the chosen form of religion", namely the Protestant Episcopal Church in the Diocese of Long Island. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303.

In the present action the only primary statute of the state the application of which can be said to be involved is the Religious Corporations Law. (L. 1909, ch. 53, as amended.)

Section 5 of that statute requires the "trustees of every religious corporation" to administer "all the temporalities

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[6] John Howard Melish is quite free to officiate in Holy Trinity as a priest of the Church.

and property real and personal, belonging to the corporation and the revenues therefrom * * * in accordance with the discipline, rules and usages of the corporation and the ecclesiastical governing body, if any, to which the corporation is subject".

Judge Conway, in an opinion in which three judges concurred making a majority of the Court of Appeals, has recently said:

> "The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions*, 11 N. Y., 243, 263-264; *Petty* v. *Tooker*, 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.*, 36 N. Y. 161.) For the public good, the Legislature decreed that the trustees of religious corporations, *irrespective of the wishes of a majority of the local congregation*, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, § 5.)" (Emphasis supplied.)

St. Nicholas Cathedral v. *Kedroff*, decided Nov. 30, 1950, Law Report News Dec. 5, 1950, p. 5, 8, not yet reported.

Clearly if the trustees, of whom John Howard Melish was one until his relation was dissolved (Relig. Corp. Law, § 41), had sought openly to divert the property to the Congregational faith, which in effect is what was attempted, they could unquestionably have been enjoined at the suit of a single parishioner.

The evils against which the constitutional guarantees sought to be invoked were intended are very different from the application to a particular state of facts of the law of the Church itself as determined by its judicatories.

When rights of property are dependent upon questions of doctrine, discipline or church government the civil courts have never hesitated to enforce the decision of an ecclesiastical tribunal.

> *Watson* v. *Jones,* 80 U. S. 679;
> *Connitt et al* v. *RPDC of N Prospect,* 54 N. Y. 551;
> *Rector St. James Church* v. *Huntington,* 82 Hun 125, 133;
> *Fiske* v. *Beatty,* 120 Misc., 1; modified 206 App. Div. 349; affd., 238 N. Y. 598;
> *Rhinelander* v. *Ballentine,* 23 Penn. Dist. Rep., 1003;
> *Church and State in the United States,* quoted at page 18 of petitioner's brief, Vol. III, p. 369 *et seq.*

In *Gonzales* v. *Archbishop,* 280 U. S. 1, a very similar objection was raised to the jurisdiction of the civil court. This Court said:

> "*First.* The Archbishop interposes here, as he did below, an objection to the jurisdiction of the Philippine courts. He insists that, since the chaplaincy is confessedly a collative one, its property became spiritual property of a perpetual character subject to the jurisdiction of the ecclesiastical forum; and that thereby every controversy concerning either the right to appointment or the right to income was removed from the jurisdiction of secular courts. The objection is not sound. The courts have jurisdiction of the parties. For the Archbishop is a juristic person amenable to the Philippine courts for the enforcement of any legal right; and the petitioner asserts such a right. There is jurisdiction of the subject matter. For the petitioner's claim is, in substance, that he is entitled to the relief sought as the beneficiary of a trust.

> The fact that the property of the chaplaincy was transferred to the spiritual properties of the Archbishopric affects not the jurisdiction of the courts, but the terms of the trust. *Watson* v. *Jones,* 13 Wall. 679, 714, 729."

If the state should undertake to exercise primary jurisdiction in ecclesiastical matters the exact situation existing today in the relationship between His Majesty's Government in the United Kingdom and the Church of England would be presented, a situation leading many members of that branch of the Anglican communion to favor disestablishment.

The Archbishop of York has recently written a book[7] which shows the effect of establishment. In it his Grace does not protest against the enforcement of the judgments of church tribunals by civil courts as found in the American authorities we have cited but against the trial of questions involving doctrine, discipline and worship in the civil courts as a matter of original jurisdiction.

It is such original jurisdiction against which our constitutional limitations apply. It is primarily the Erastinian doctrine legislated into the Act for the Submission of the Clergy in 1554 (25 Hen. VIII, c. 19) that was forbidden.

This is a far cry from a declaratory judgment and injunctive relief for the protection of property rights based upon the judgment of a Bishop who is made "ultimate arbiter and judge" by the canon admittedly governing the question presented to him in the present case.

The right of a bishop of the Protestant Episcopal Church to invoke the aid of a court of equity has been expressly upheld and is the law of the state.

> *Fiske* v. *Beatty,* 206 App. Div. 357, 360; affd. 238 N. Y. 598.

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[7] Church and State in England by Cyril Garbett, Archbishop of York, London 1950, Hodder & Stoughton.

An ecclesiastical penalty against the vestry is necessary because in the *Fiske* case the Appellate Division, modifying the judgment below held that, while he may restrain the recalcitrant priest, a bishop may not restrain a contumacious vestry whose authority to act may only be tried in *quo warranto.*

Assuming *arguendo* that petitioners were correct in their interpretation of the canon law and that there is no *ecclesiastical remedy* against a contumacious priest who defies the judgment of his Bishop, there is still no question whatever of constitutional guarantees in this case where a defiant priest (473) refuses to relinquish control of the worship and the spiritual jurisdiction of a parish and the use of the church and parish buildings and 'admits that he intends to continue as Rector of the Parish', (132), in violation of the canon law.

If this were possible the whole government of every centrally organised church would be destroyed and its temporalities and property, instead of being administered in accordance with the discipline, rules and uses of the ecclesiastical governing body to which the Church is subject (Religious Corp. Law, sec. 5), would be administered according to the vagaries of the individual congregation.

This is exactly what these petitioners have sought to accomplish, namely, to place a parish of the Protestant Episcopal Church in the class described in *Watson* v. *Jones, supra,* as a religious congregation which is strictly independent of other ecclesiastical association and as far as church government is concerned owes no fealty or obligation to any higher authority.

As stated by the Appellate Division in *Fiske* v. *Beatty,* 206 App. 349, 356:

> '* * * The true doctrine of the Protestant Episcopal Church in America, in relation to the sources of power of a priest or rector, as we understand it, is correctly expressed as follows: "In the Church,

> power does not *ascend* from the congregation or the vestry to the rector; it *descends* from above to the Bishop and through the Bishop to the subordinate ministry." (White's Church Law [ed. 1898], 185.)' (Emphasis in original.)

To find in this case the constitutional question presented in the petition would submit this and all other centrally organised churches to a change in the form of their own peculiar church government by judicial decree and thereby adopt the very Erastinian doctrine against which the First Amendment protects.

Religious freedom does not mean religious license. Each member of the Protestant Episcopal Church is free to bring before General Convention or the convention of his diocese any amendment of the canon law. Until the canons are amended he must obey them. (*Watson* v. *Jones, supra.*)

Indeed these petitioners were instrumental in bringing before the General Convention of 1949 amendments to Canon 46 of General Convention which, in the absence of a diocesan canon, deals with the subject of dissolution of the pastoral relation. (Plffs. Ex. 2.)

It was rejected in both Houses[8] as stated in the extract from *Church and State in the United States,* quoted at page 27, *infra.*

The judgment in this action is dated April 25, 1949. (R. 136.) The General Convention was held from September 26 to October 7, 1949 so that the supreme governing body of the Church refused to amend the canon law upon this subject after interpretation by the Bishop and Standing Committee and the judgment herein.

The fact that no ecclesiastical penalty against a contumacious clergyman is expressly stated in canon 27 cannot

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[8] Journal of the General Convention of the Protestant Episcopal Church in the United States of America, printed for the Convention, 1949, pp. 197-200.

make the application of Section 5 of the Religious Corporations Law to the facts found in the present suit unconstitutional.

Enforcement under that section of a judgment of the church judicatories does not fall within the constitutional limitations defined by this Court in *Everson* v. *Board of Education,* 330 U. S. 1 at pages 15-16 or in *McCullom* v. *Board of Education,* 333 U. S. 203, at pages 209-212.

No church is set up. No law has been enforced aiding or preferring one religion over another. No force or influence has been used against any person to compel him to go to or remain away from church against his will or to profess a belief or disbelief in any religion. No one has been punished for belief or disbelief or church attendance or absence from church. No tax has been levied to support religious activities. Nor has the State sought to "participate in the affairs of any religious organisations or groups". (Pet., p. 22.)

The absence of an ecclesiastical penalty against the clergyman in fact brings this case squarely within *Watson* v. *Jones, supra,* where the opinion of the Court begins with these words:

> "This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or *found itself unable to protect.* Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; *the courts when so called on must perform their functions as in other cases.*" (80 U. S. at pages 713-714, emphasis supplied.)

Later with respect to centrally organised religious bodies as defined in the opinion at page 722 the Court said:

> "In this class of cases we think the rule of action which should govern the civil courts, *founded in a broad and sound view of the relations of church and state under our system of laws,* and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried,[9] the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." (p. 727, emphasis supplied.)

(b)

No title, right, privilege or immunity was specially set up or claimed under the Constitution of the United States in the state court.

For the basis of the claim of jurisdiction we turn to the petition.

It is first asserted that "in their answers all petitioners pleaded as a defense the facts which form the basis of the question upon which review is sought. (R. 68-69, 101-102.)" (Pet., p. 4.)

The answer of defendants Melish pleaded the following "as a partial defense" (R. 68-69):

> "Thirty-First: Canon 27 of the Diocese of Long Island (See paragraph 'Twentieth' hereof as Exhibit 'I') provides the sole remedy for neglect or refusal on the part of the congregation to comply with a judgment of the Bishop rendered thereunder, and such sole remedy is to deprive the congregation of a representative to the Diocesan Convention until they submit thereto.

---

[9] Canon 27 makes the Bishop "the ultimate arbiter and judge". (Pet., p. 11.)

Thirty-Second: On information and belief, the congregation refuses to comply with the purported judgment of the defendant Bishop.

Thirty-Third: Canon 27 of the Canons of the Diocese of Long Island provides that it shall be the duty of a Rector to submit to and abide by the judgment of the Bishop rendered thereunder. Canon 53 of the Canons for the Government of the Protestant Episcopal Church in America provides the sole remedy for violation by a Rector of the Canons of the Diocese to which he belongs, namely, trial and presentment before the Ecclesiastical Court for the Diocese.

Thirty-Fourth: A civil court, therefore, has no power to grant any other, further or different relief in the premises."

This was a conclusory statement, the only fact being the canon itself which was placed in evidence by plaintiffs (Plffs. Ex. 3) and is printed at pages 71-73 of the record.

No constitutional question arising out of the provisions of the canon was presented to the trial court.

At the close of the plaintiffs' case counsel for defendants other than De Wolfe moved to dismiss as follows (R. 156):

"Mr. Weissman: I have some motions, Mr. Smith.

The Court: Very well. We will hear your motions.

Mr. Weissman: I move to dismiss the complaint, on the ground that the plaintiffs have not adduced evidence sufficient to constitute the cause of action pleaded in the complaint, and specifically that portion of the complaint which alleges that there was no hearing on March 7, 1949, which was the basis of the removal procedure of the nine vestrymen. There is no evidence offered in support of that, and I now move to dismiss that portion of the complaint.

Mr. Smith: I think that point is well taken, and I join in the motion.

The Court: Denied.

Mr. Weissman: Exception."

At the close of the trial the parties moved for judgment without any statement of grounds therefor. (R. 479-480.)

No express reference to the Constitution can be found either in the pleadings (R. 9-133) or case and exceptions. (R. 141-481.)

Upon the appeal to the Appellate Division, counsel for appellants John Howard Melish and William Howard Melish stated the questions raised by their appeal, as follows:

> "The Question Raised by This Appeal.
>
> The questions raised by this appeal are:
>
> Should a Civil Court intervene in an ecclesiastical dispute to enforce a Bishop's purported judgment when the remedies provided in the discipline of the Church have not been exhausted?
>
> Has a Bishop of the Protestant Episcopal Church the power, without action by an Ecclesiastical Court, to decree a separation of the pastoral relation between a Rector and his Parish against the expressed wishes of the Rector and the Congregation?
>
> Should a Civil Court enforce a Bishop's judgment which is arbitrary and not supported by the evidence before him?" (Melish brief, p. 2.)

The oral argument of counsel was confined to the following statement in his brief:

> "ARGUMENT
>
> These appellants will argue:
>
> I. Since the remedies provided in the discipline of the Protestant Episcopal Church had not been exhausted, the Court below erred in its intervention to enforce the Bishop's purported judgment.
>
> II. The Bishop had no jurisdiction to decree a separation of the pastoral relations where neither the Rector nor the Congregation desired such a separation.
>
> A. The Vestry is the agent of the Congregation and can petition the Bishop only as such.

B. The Chancellor misconstrued the law and misrepresented the function of a Vestry misleading the Bishop and the Standing Committee.

III. The recommendation of the Standing Committee and the judgment of the Bishop were arbitrary and unreasonable in that there was no sufficient evidence to sustain the charges." (Melish brief, pp. 8, 9.)

Counsel in his brief stated his conclusion, as follows:

"CONCLUSION

"The powers of a Bishop of the Protestant Episcopal Church are much more circumscribed than those of a Bishop of some other denominations. In the Protestant Episcopal Church, if the Rector and his Congregation do not seek a separation, only through action by the Ecclesiastical Court may a Rector be deposed or disciplined. Without such action, the Bishop of the Diocese is powerless to interfere. He may offer advice and counsel, but he may take no steps to punish except to arrange a presentment before the Ecclesiastical Court. If this Bishop wished to act, that was his remedy—a remedy which he eschewed perhaps because he knew that the Rectors had done no acts and were guilty of no conduct punishable under the rules of the Church. If such be the case, the Rectors are entitled to exoneration by the judicial body of the Church; conversely, if they have offended the Church's rules, it is that body, and not the Civil Courts, which should rebuke them.

The judgment in favor of the plaintiffs and the Bishop declaring that the pastoral relation had ceased and enjoining the defendant Rector from exercising control of the worship of the Church and from using its buildings or appurtenances should be reversed, with costs, and judgment granted for these defendants *enjoining the individual plaintiffs and the Bishop from taking any steps to enforce the Bishop's judgment except by appropriate action within the discipline of the Church.*" (Melish brief, pp. 25, 26, emphasis supplied.)

Neither in his brief nor in his oral judgment was any reference made to the Constitution of the United States of America.

On the contrary they sought enforcement of the law of the Church, as they interpreted it, by the civil court.

At the Appellate Division the brief of counsel for appellants Reynolds and Mason contained the following points:

"SUMMARY OF POINTS

I. The Bishop's arbitral judgment is a nullity, because the submission of the differences to him by the petition of the former Vestry was expressly disapproved by over 70% of the Congregation, for whom that Vestry acted as agents and legal representatives.

II. The judgment of the Court below was unauthorized, because the Canons themselves provide the exclusive ecclesiastical remedy for their enforcement, namely, deprivation of Diocesan representation until the parties submit.

III. The statutory provision that a special meeting may be held on any secular date fixed by the Vestry does not apply to the special meeting in issue here, for this one was called pursuant to the inherent power of the Congregation to summarily remove its agents and representatives for recreancy and it was shown that the Vestrymen would not have fixed the date, even if requested." (Reynolds brief, p. 22.)

Neither in his brief nor in his oral argument was any reference made to the Constitution of the United States of America. Like the Melishes they sought the judgment of the court.

A claim of jurisdiction, moreover, cannot be sustained by reference to briefs and statements which are not part of the record.

Lynch v. *New York*, 293 U. S. 52.

Where facts from which a federal question might arise are argued in the state court but their alleged federal character as here was not indicated they cannot be made the basis of an application for a writ of certiorari.

> *Chicago Indianapolis &c. Ry. Co.* v. *McGuire,* 196 U. S. 128, 131.

A mere claim in a pleading never afterwards brought to the attention of the state court is insufficient where there is no evidence in the record that the decision of the court was invoked upon a right under the Constitution.

> *Hulbert* v. *Chicago,* 202 U. S. 275, 280.

This Court declines jurisdiction where the record does not present a constitutional question substantial in character and properly raised below.

> *Corrigan* v. *Buckley,* 271 U. S. 323, 329 and cases cited.

In *Oxley Stave Company* v. *Butler County,* 166 U. S. 648, cited by petitioners, the Court referring to the words "specially set up or claimed" said at page 654:

> 'This question must receive a negative answer, if due effect be given to the words "specially set up or claimed" in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so de-

clare; and unless he does so declare "specially", that is, unmistakably, this court is without authority to reexamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular State does not import that he is a citizen of that State. *Brown* v. *Keene,* 8 Pet. 112, 115; *Robertson* v. *Cease,* 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.'

Petitioners' quotation from *Dewey* v. *Des Moines,* 173 U. S. 193, is incomplete. The statement of the Court at page 199 was:

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby* v. *Colehour,* 146 U. S. 153, 159; *Chicago, Burlington &c. Railroad* v. *Chicago,* 166 U. S. 226, 231; *Green Bay &c. Company* v. *Patten Paper Company;* and *Bank of Lincoln* v. *Bank of Cadiz, supra.*"

On the same page the Court said:

> "* * * It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature."

In the portion of the decision of the trial court from which petitioners quote at page 13 of their brief the court was citing and applying the rule in *Watson* v. *Jones, supra.* However the fact that federal questions are discussed in an opinion gives no right of review where no claim under the Constitution was presented.

Howard v. *Fleming,* 191 U. S. 126, 137.

The claim of title, right, privilege or immunity must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, (*Mutual Life Insurance Co.* v. *McGrew,* 188 U. S. 291, 308) and upon the question whether or not such a claim has been asserted the decision of the state court is binding upon this Court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right.

Atlantic Coast Line RR Co. v. *Mims,* 242 U. S. 532.

Here the Court of Appeals has done nothing more than decline to pass upon the constitutional question because not raised in the court below as required by the state practice. (R. 591.)

Missouri-Pacific Ry. Co. v. *Taber,* 244 U. S. 200;
Hartford Life Ins. Co. v. *Johnson,* 249 U. S. 490, 493;
Postal Telegraph Cable Co. v. *White,* 296 U. S. 534;
Penn R. Co. v. *Ills. Brick Co.,* 297 U. S. 447, 463;
Louisville & Nashville RR Co. v. *Woodford,* 234 U. S. 46, 51;
Layton v. *Missouri,* 187 U. S. 356, 361.

Dr. Anson Phelps Stokes is quoted at page 18 of petitioners' brief as stating that this case "will be one of the most important cases in recent years involving Church-State relations."

The portion of Dr. Stokes's recent book "Church and State in the United States," (New York 1950, Harper & Brothers), Vol. III, pp. 395-403, upon which petitioners rely is a brief for the Melishes. Yet he states the rule in *Watson* v. *Jones, supra,* where, after quoting from the Canons of General Convention, he says:

> "It is only the interpretation and enforcement of these and similar provisions in cases of dispute in matters of property and clergy rights, which cannot be settled by ecclesiastical authority, that are the function of civil courts in dealing with the Church. * * *." (p. 401.)

The reverend author ends his comment on the matter as follows:

> "It appears to an outsider reading both sides of the controversy that in principle the stand of the Melishes is the one most in keeping with the general American tradition of freedom, but that the specific wording of the canons of the Episcopal Church and of the Diocese of Long Island may support the old vestry and the lower court; and that if the Episcopal Church wants to insure greater protection for its clergy and its congregations, when their views differ from those of diocesan authority, the canons may need to be modified. *But the General Convention of the Church in San Francisco in 1949, decided not to take the action urged by supporters of the Melishes to add to the canons provision for review by higher diocesan courts of diocesan action in such cases.*" (pp. 402-403, emphasis supplied.)

The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids.

Osborn v. *Ozlin,* 310 U. S. 53, 62;
Hoopeston Canning Co. v. *Cullen,* 318 U. S. 313;
State Farm Ins. Co. v. *Duel,* 324 U. S. 154, 157.

Moreover the decision in the present case has no binding effect upon the Church outside the diocese of Long Island. Canon 46 of General Convention which deals with the subject of the dissolution of the pastoral relation contains the following provision:

> "Sec. 4. This Canon shall not apply in any Diocese or Missionary District which has made, or shall hereafter make, provision by Canon upon this subject, nor in contravention of any right of any Rector, Minister, Parish, Congregation, or Vestry under the law of the Civil Authority." (Plffs. Ex. 2.)

It will thus be seen that each diocese is completely free to adopt any canon on the subject it pleases. General Convention has rejected any amendment and no action such as "the supporters of the Melishes" urged at San Francisco in 1949 has to our knowledge been taken by any diocese.

Procedure

(a)

Petitioners seek a writ directed to the Court of Appeals. (Pet., p. 1.) The writ should be denied on the additional ground that it is not directed to the proper court. Section 1257 provides for review of "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Where the court of last resort in a state has refused to take jurisdiction of the case by appeal or writ of error, its action is not a final judgment or decree.

> *Adam* v. *Saenger*, 303 U. S. 59, 61;
> *Western Union* v. *Priester*, 276 U. S. 252, 258;
> *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 20.

This Court, in *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269, stated the rule to be:

> "* * * where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort

> of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo Case,* and shall therefore, by not departing from the face of the record, resolve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

A writ can only be directed to the Court of Appeals if by its order dismissing the appeal it assumed jurisdiction to pass upon the merits of the controversy. In its decision the court specifically gave as a reason for granting the motion to dismiss the absence from the case of any constitutional question properly raised. (R. 591.) Such action by it was not an assumption of jurisdiction and a decision on the merits. It was a decision that it had no jurisdiction.

> *Cuyahoga Power Co.* v. *North'n Realty Co.,* 244 U. S. 300.

There the complaint of the plaintiff in error was dismissed at trial term. The case was then appealed to the Ohio Court of Appeals and there affirmed. Plaintiff in error then applied to the Supreme Court of the State to direct the Court of Appeals to certify the record for review and on the denial of such application prosecuted a writ of error to the Court of Appeals from the Supreme Court. This writ was dismissed by the Supreme Court for want of jurisdiction on the stated ground that the case did not "involve any question arising under the Constitution of the United States or the State of Ohio." Under the Ohio statutes, as under the statutes of New York, a writ of review by the court of last resort exists if a question under

the Constitution of the United States or of the State Constitution is presented in the case.

A writ of error was obtained which was directed to the Court of Appeals of the State of Ohio. The jurisdiction to review of this Court was then challenged by motion to dismiss. One of the grounds was that the writ should have been directed to the Supreme Court of Ohio and not to the intermediate Court. The motion was denied, the Court saying:

> "1. It is contended that as under § 237 of the Judicial Code we have jurisdiction to review only final judgments of the highest court of the State in which a decision could be had, the writ of error should have been prosecuted to the Supreme Court of Ohio. In view, however, of the denial by that court of the application to direct the Court of Appeals to certify the record for review, and its order dismissing the writ of error for want of jurisdiction, the contention is without merit." (pp. 302-303.)

The petitioners here are in the same dilemma, with a transposition of the courts to which the writ is sought, as the petitioner in *Matthews* v. *Huwe,* 269 U. S. 262. A writ will not lie to the Court of Appeals since it did not assume jurisdiction and therefore the Supreme Court becomes the highest court in which a decision could be had. However, a writ will not lie to the Appellate Division of the Supreme Court because under the New York State Constitution, Article 6, Section 7, subdivision 5, and Civil Practice Act Sections 588, 589, after dismissal of an appeal as of right to the Court of Appeals, appellants are given the right to apply to the Court of Appeals for permission to be heard on the merits in the interest of substantial justice. No such application was made by these petitioners and by reason of failure so to apply they have not exhausted their remedies in the State court and any writ directed to the Appellate Division would likewise be dismissed.

Matthews v. *Huwe, supra,* p. 265;
Stratton v. *Stratton,* 239 U. S. 55.

(b)

In view of the provisions of Sections 588 and 589 of the Civil Practice Act of the state, the present judgment does not possess the finality necessary to vest this Court with jurisdiction under Section 1257 of the United States Code.

After dismissal of their appeal as of right to the Court of Appeals it was possible for these petitioners to apply to that court for permission to appeal. (CPA §§ 588, 589.)

A judgment must be final in two senses. It must be subject to no further review or correction in any other state tribunal and must also be the final word of a final court.

Market Street R. Co. v. *Comm'n.*, 324 U. S. 548, 551.

The present case falls within the rule stated in *Matthews* v. *Huwe*, 269 U. S. 262, 265, where the Court said:

> "Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the State. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made."

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JACKSON A. DYKMAN,
Of counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 469

JAN 25 1951
CHARLES ELMORE CROPLEY
CLERK

JOHN HOWARD MELISH, WILLIAM HOWARD MELISH, LEWIS REYNOLDS, ANNA MAY MASON and all other persons similarly situated or whom the same may represent,

Petitioners,

—against—

THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN, a religious corporation; LEONARD HULL SMITH and RANDALL O. WALKER, individually and as Wardens of said Church; JOSEPH DANA ALLEN, HAUGHTON BELL, BRUCE BROMLEY, MERRILL N. FOOTE, WALDO W. SELLEW, H. EDWARD VOLLMERS and BURTON H. WHITE, individually and as Vestrymen of said Church, and JAMES PERNETTE DEWOLFE as Bishop of the Diocese of Long Island,

Respondents.

OBJECTIONS OF RESPONDENTS (OTHER THAN JAMES PERNETTE DE WOLFE) TO MOTION ON BEHALF OF SOME 2576 MEMBERS OF THE CLERGY OF VARIOUS RELIGIOUS DENOMINATIONS OF PROTESTANT CHURCHES IN THE UNITED STATES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

THEODORE KIENDL
WILLIAM R. MEAGHER
Attorneys for respondents other than James Pernette De Wolfe

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